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**A BRIEF IN SUPPORT OF**  
**CERTAIN PROVISIONS ESSENTIAL**  
**TO A**  
**SOUND LABOR LAW**

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*by*

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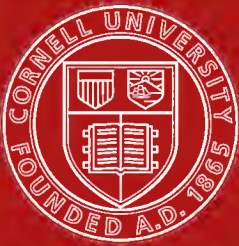
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## TABLE OF CONTENTS

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|                                                                                                                                                    | PAGE   |
|----------------------------------------------------------------------------------------------------------------------------------------------------|--------|
| INTRODUCTION .....                                                                                                                                 | 1      |
| SUMMARY OF ARGUMENT.....                                                                                                                           | 2      |
| ARGUMENT .....                                                                                                                                     | 13     |
| I. Unions and their agents should be responsible<br>for their unfair labor practices.....                                                          | 2, 13  |
| II. The tyranny of the closed shop should not be<br>revived .....                                                                                  | 3, 21  |
| III. Secondary boycotts and jurisdictional strikes<br>should be restrained.....                                                                    | 4, 25  |
| IV. Unions, as well as management, should be<br>obligated to bargain collectively in good faith                                                    | 6, 28  |
| V. Management should retain the right to speak<br>freely .....                                                                                     | 7, 32  |
| VI. The ranks of management should not be<br>divided by compelling bargaining with super-<br>visory employees.....                                 | 8, 37  |
| VII. Management should retain the right to peti-<br>tion for elections. Employees should retain<br>the right to terminate a union's authority..... | 9, 40  |
| VIII. Unions, as well as management, should be<br>liable for breach of contract.....                                                               | 10, 44 |
| IX. The President should have power to invoke<br>restraints on strikes involving national wel-<br>fare .....                                       | 11, 46 |
| X. Welfare funds should be trust funds jointly<br>administered by management and union rep-<br>resentatives .....                                  | 12, 49 |
| XI. Benefits of the Act should be denied to com-<br>munist-dominated unions.....                                                                   | 13, 51 |
| CONCLUSION .....                                                                                                                                   | ,52    |



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## INTRODUCTION.

The purpose of this brief is to urge the continuance of certain provisions of the present national labor law because they define the responsibilities of unions as well as of management, equalize those responsibilities, and provide for adequate government authority to protect the national health and safety from labor disputes which threaten them.

If unions are capable of abuse, as the record shows they are, appropriate measures should be available to remedy the abuses. Unions have achieved their present power through the aid of the Wagner Act. Their exercise of that power should be subject to law when it exceeds or threatens to exceed permissible limits.

The purpose of this brief is, also, to attempt to bring into focus situations which, in much of the present discussion of labor policy, are veiled in vagueness and uncertainty.

Typical of this vagueness are the assertions made regarding the President's power to act in the case of strikes which affect the national welfare. That "no President would permit the economy of the country to come to its knees" is an assertion without substance. It does not establish the right of the President to deal effectively with a situation under the federal constitution and statutes. It is at best a hope and at worst an evasion. And as such, it gives a false sense of security against the menace of labor disputes of such scope as to threaten the nation.

This brief is intended to prove that the limited experience with the present law demonstrates the soundness of certain of its provisions, and to answer those who have characterized this legislation as a "slave labor law."

## SUMMARY OF ARGUMENT.

### I.

**Unions and their agents should be responsible for their unfair labor practices.**

**The Wagner Act recognized only unfair labor practices by Management.**

**The present law holds also unions and their agents responsible for their unfair labor practices.**

**The President's Bill eliminates this responsibility of labor unions and reverts to the Wagner Act except as to strikes and secondary boycotts in jurisdictional disputes, or to compel disregard of a Board certification, of an order to bargain, or of a recognized union.**

Provisions of the present National Labor Relations Act, making unions responsible for unfair labor practices, have been denounced as a "slave labor" law.

However, the record shows that as a result of the impact of Court decisions and public opinion, techniques for checking abuses committed in the course of labor disputes were developed under the Wagner Act.

Strikers who were discharged claimed before the Labor Board that their employers thereby violated the Wagner Act and that they should be reinstated to their jobs. If the Board found that the strikers had committed any of a variety of wrongful actions, they lost their claims to reinstatement.

No cry of labor enslavement was raised. No charge was made that the rights of self-organization or collective bargaining were being destroyed.

Many of these cases reasonably suggest that the unions, too, were responsible for the wrongful conduct of the strikers. The unions, however, were shielded from responsibility because, under the Wagner Act, the Board could proceed only against employers for their unfair labor practices.

This method to deter wrongful conduct is plainly insufficient. The wrongdoing strikers escaped responsibility if they did not file unfair labor practice charges against their employer. Even if they did file such charges, no remedy was available to assure that the wrongful acts would not recur. And, in no event, could unions be held responsible

even if they instigated or participated in the wrongful conduct because unfair labor practice charges could not be filed against them.

**The present law places responsibility where it justly should rest—upon the unions themselves.**

The responsibility of unions for unfair labor practices established under present law imposes no enslaving burdens. It levies no fines, penalties or forfeitures. Its purpose is to provide for relief from unfair practices and prevent their recurrence rather than to penalize the offenders.

These provisions do not in any sense make for labor slavery.

## II.

**The tyranny of the closed shop should not be revived.**

Under the Wagner Act the closed shop was encouraged and the right to remain unaffiliated with a union was discouraged.

The present law, in barring the closed shop, recognizes and sanctions the right of any employee to join a union, and equally recognizes his right not to be coerced into union affiliation except in the event of a duly certified union shop.

The President's Bill eliminates the ban on the closed shop and has the effect of restoring it and all the evils which must follow upon such restrictions against the right to work.

The present statute outlaws the *closed shop*. The *union shop* is permissible if the requirements of the statute are satisfied. When the union shop is authorized, employees may not be subject to discriminatory treatment by union organizers in obtaining union membership. They are entitled to membership upon payment of the regular initiation fees and dues. Excessive fees are barred. Discharges under a union shop clause can occur only for non-payment of initiation fees and periodic dues.

The unions claim that an unregulated closed shop is essential to their existence.

Union leaders fail to cite a single instance of the death of a labor organization because of the present ban against the closed shop.

Unions have achieved growth more by reason of the function and authority as collec-

tive bargaining representatives which has been enforced and broadened by law, rather than by reason of the monopoly of the closed shop.

As firm a supporter of labor as the late Mr. Justice Brandeis regarded the closed shop as "the exchange of the tyranny of the employer for the tyranny of the employees."

A return to absolute union control over hiring is unwarranted particularly at a time of growing union political activity. Being able to attain assurance of financial payments by all employees in the bargaining unit in support of its functions through the present union shop provision, the union should depend on its effectiveness as collective bargaining representative rather than on its economic power over the employees. The closed shop has been used to interfere with political freedom, to aid racial discrimination, to suppress fair criticism, to punish for testifying and taking court action against the union and to penalize employees for activities on behalf of a rival union prior to the effective date of the closed shop and for activity on behalf of a rival union upon the expiration of a contract. This does constitute labor slavery.

### III.

**Secondary boycotts and jurisdictional strikes should be restrained.**

**The Wagner Act afforded no relief from these weapons employed by some unions to compel compliance with their wishes.**

**The present law bans such coercive practices.**

**The President's Bill forbids secondary boycotts only in the case of jurisdictional strikes, or in defiance of a Labor Board certification or a validly existing contract without provision for injunction.**

The present law makes secondary boycotts and jurisdictional strikes unfair labor practices. The Labor Board has the right to obtain Federal Court injunction against such conduct pending a final determination of the case by the Labor Board.

Secondary boycotts have caused serious economic injury to the public welfare and persons having no interest in the dispute. Small business particularly has been a

victim of such conduct because of its inability to cope with powerful unions.

Speedy and effective government intervention through the Labor Board's application to the Federal Courts for an injunction is essential to limit economic loss and prevent the spread of industrial warfare. While the statute creates a private right to recover money damages against the offending union, the loss in most instances is irreparable. Because injunctive relief cannot be invoked by private parties themselves, the remedy is not subject to abuse. The remedy of injunction under the present law is available only to the government.

The unions claim that the curb on secondary boycotts marks a return to government by injunction.

What does the record of eighteen months of such restriction actually show?

In the first six months of operation of the law, the Board filed nine petitions in Federal Courts to enjoin secondary boycotts. For the eighteen month period, approximately eighteen such applications were made and in four of these cases, injunctions were denied.

Actually, the ban against secondary boycott is of limited effect on the union's right to engage in industrial warfare. Direct strikes against the immediate employer for recognition or economic reasons are not affected. To constitute a violation of existing law, the union must strike against the secondary employer or induce his employees to cease work. If the primary employer subcontracts his work to the latter, a strike against the subcontractor is not prohibited by the statute and both employers are regarded as allies in the principal dispute, and therefore legitimately subject to boycott.

The jurisdictional strike over assignment of work and the strike or boycott to force a disregard of the Labor Board's certification of a bargaining representative cannot be justified. The President's labor Bill would ban such union action. An employer who yields to the union's pressure and defies a Board certification violates the law. Yet, compliance with the Labor Board's certification may be fatal to his business because of the economic pressure directed by a rival union.

There is no element of slave labor in prohibiting such union conduct.

## I V .

**Unions, as well as management, should be obligated to bargain collectively in good faith.**

**The Wagner Act made it mandatory that management bargain in good faith. Management refusal to do so resulted in a cease and desist order.**

**The present law also imposes the same obligation on unions—no more no less.**

**The President's Bill, by eliminating this requirement, reverts to the one-sidedness of the Wagner Act.**

Collective bargaining contemplates that both parties shall meet and negotiate to the end that a meeting of minds shall be achieved. If either management or labor goes to the bargaining table with a mind "hermetically" sealed against agreement, no agreement can be reached.

If a union may submit demands on a "take it or leave it" basis, backed by a threat of strike action, the basic objective of the law is defied; since the law was designed to encourage collective bargaining as a substitute for strike action.

Once the labor agreement is entered into, the law today relieves the parties of the obligation to discuss modification during the contract term unless the agreement provides for such reconsideration. Both parties are thereby equally bound during the life of the agreement. In this manner stability in industrial relations, wages, hours and terms of employment is secured. Manifestly, the parties are at liberty to modify their agreement by mutual consent.

The law further encourages recourse to the peaceful procedure of collective bargaining before either side may turn to industrial warfare. It provides sixty (60) days notice of intention to modify or terminate an expiring contract, and requires the parties to meet and negotiate for a new agreement during that time without strike or lockout.

This is not a condition of slave labor.

## V.

**Management should retain the right to speak freely.**

Under the Wagner Act, while management nominally enjoyed its constitutional prerogative of free speech, the hazard of talking was exceedingly great. As a result, management was substantially silenced.

The present law protects the right of management and union to speak freely so long as there is no threat of reprisal or force and no promise of benefit.

**The President's Bill eliminates this protection.**

There is no question that employees and unions enjoy the right to speak freely—a right guaranteed by the Wagner Act and a constitutional right of all Americans, mandatory under the Bill of Rights. The same right is now recognized for management, not by virtue of a Labor Board ruling or a Court decision, but by the express language of the statute.

The law must not be altered to permit the impairment of this right. If unions are to continue, as well they should, with the right to speak freely, it is imperative that any fair labor law must grant the same right to management.

Even labor spokesmen have conceded that adequate protection of management's right of free speech is essential. Judge Padway, one of the foremost lawyers representing labor, pointed out in the official organ of the American Federation of Labor that if labor unions and their members desire to retain the full benefits of freedom of speech, the same privileges must in nowise be denied management.

The Supreme Court has recognized that the right of free speech should be exercised by management with respect to union organization.

While it is true that during the latter days of the Wagner Act the Labor Board broadened the scope of employers' right to speak to employees on labor matters, it repeatedly restricted this constitutional right whenever in its judgment it saw fit so to do. The specific assurance granted management in the existing law should be retained. It should be made crystal clear that no administrative denial of a fundamental privilege will be permitted so long as the privilege is not abused.

**This is not a condition of slave labor.**

## VI.

**The ranks of management should not be divided by compelling bargaining with supervisory employees.**

**The Wagner Act compelled management to bargain collectively with supervisors.**

**The present law, recognizing supervisors as part of management, does not obligate management to bargain collectively with them unless it wishes to do so.**

**The President's Bill would restore supervisors' right to compel collective bargaining.**

Foremen and other supervisory employees are the "arms and legs" of management and its direct contact with employees in the execution of labor policies and the administration of the labor contract. They must be consulted in order to prepare properly for collective bargaining negotiations with the union. Complete loyalty to management is an essential ingredient of their jobs.

Management is responsible for the illegal anti-union conduct of supervisors. Even when they have violated instructions not to engage in such conduct, management has been held liable. This responsibility has been imposed on management when employees may reasonably conclude that the conduct of its supervisors represents the attitude of management.

Mandatory collective bargaining with supervisory employees disturbs the traditional balance of power in the bargaining process. Experience under the Wagner Act shows that, just as soon as supervisory employees were granted bargaining rights, unions representing rank and file employees organized the supervisors in affiliated unions. Thus, the unions representing the rank and file employees were in a position to exert pressure upon management's representative and place in jeopardy the trust and loyalty which constitute an integral part of the supervisory job.

The self-interest of supervisory employees, who attain a place in management on the basis of complete loyalty, must be subordinated to the paramount interest of establishing confidence and fair play in the collective bargaining process between management and unions representing the rank and file employees.

## VII.

**Management should retain the right to petition for elections. Employees should retain the right to terminate a union's authority.**

The Wagner Act made no such provisions. The Labor Board permitted employer petitions only when two or more unions claiming to represent the same employees demanded bargaining rights of the employer. The Board refused to entertain petitions by employees to revoke the authority of a bargaining representative.

The present law authorizes an employer to file a petition for election, and employees may petition for revocation of authority of an existing bargaining representative.

The President's Bill reverts to the situation under the Wagner Act.

The present law permits an employer to file a petition for certification of bargaining representative when he has been presented with a claim for recognition by a union. Union representatives claim that an unscrupulous employer can, by this provision, compel an election before the union is ready for it.

This claim overlooks the fact that an employer cannot file a petition until the union has served him with a demand for bargaining rights. By withholding the demand until it is ready for an election, the union avoids the danger of a premature election.

The existing statute also provides for the decertification of a recognized or certified union upon the petition of employees. This procedure, whereby employees may definitely terminate the authority of the bargaining representative, is said to be in conflict with the policy of encouraging collective bargaining. The essence of free collective bargaining, however, is freedom of choice to designate bargaining representatives on the part of employees.

Under the Wagner Act, the employees had no means for terminating the authority of a bargaining representative unless a petition for certification was filed by another union. The Labor Board ruled that it had no power to entertain decertification petitions and could not conduct an election for that purpose. As a result employees, who desired to

terminate their bargaining representative, were without relief unless they had selected another union to act in their behalf. This "slave" labor provision was cured by the present law.

If the employees failed to designate a new bargaining representative and the labor contract was renewed pursuant to its provision or by agreement, they were saddled with the rejected representative for the period of the new contract because that contract prevented a newly designated representative from being certified by the Board. In effect, then, an unwanted union remained as bargaining representative and the employee's freedom of choice was ignored. Emancipation of slave labor was here accomplished under the present law.

## VIII.

**Unions, as well as management, should be liable for breach of contract.**

**The Wagner Act made no provision for liability in the case of a breach of contract by a union.**

**Under the present law, unions which have entered into labor contracts may be sued for breach thereof. The union membership, however, is shielded from any personal liability for damages for breach of the contract.**

**The President's Bill, by its repeal of the present law, reverts to a one-sided standard.**

The present law provides that a union may be sued as an entity for its violations of a labor contract. This provision recognizes the unreality of the laws of many states, which make it difficult effectively to sue or to recover a judgment against a labor union because most of the unions are unincorporated associations and not subject to suit at common law.

The existing law, taking cognizance of Court decisions that collective bargaining, even under the Wagner Act, is not a unilateral undertaking binding only upon the employer, makes contracts binding upon both parties by giving them equal access to remedies for a breach by the other party.

The Labor Board has visited responsibility upon employees, who strike in violation of a no-strike clause, by

denying them the right to reinstatement if the employer discharges them. The present law permits the union to be held responsible if it caused the violation of the contract.

## IX.

**The President should have power to invoke restraints on strikes involving national welfare.**

The Wagner Act made no provision with respect to strikes affecting the national health and safety.

The present law recognizes the right of Government to intervene when strikes threaten the national health or safety. The President has the power to convene a fact-finding board and the Courts by injunction may delay for eighty days a strike constituting a national emergency, upon application of the Attorney General, acting at the direction of the President. The eighty day injunction period is utilized to permit further study by the fact-finding board, publication of its report and holding of an election by the Labor Board among the employees as to whether they wish to accept the employer's last offer of settlement.

The President's Bill provides only for the appointment of an "emergency board" and the publication of its findings and recommendations. No provision is made for the Government's right to obtain an injunction.

That some remedies must be available to protect the nation from the danger of strikes affecting national health and safety is acknowledged even by the proponents of the President's Bill.

There were no such provisions in the Wagner Act; there are no effective ones in the President's Bill. The present law, on the other hand, specifically recognizes the Government's right to intervene in strikes of such broad effect and grave implications, and provides specific means for dealing with them. These means might be improved upon; they should not be eliminated.

In lieu of specifically granting the President power to invoke restraints, through the Attorney General, the President's Bill would leave such restraints to some vague undefined implicit authority. To some, the power is apparently

a Constitutional grant (grant not defined or described); to some it is the power of public opinion; to some a metaphysical assumption that the President "could not" fail to find a means to halt such a strike.

In view of the strict limitations imposed upon the granting of injunctions in labor disputes by the Norris-LaGuardia Act which would probably bar an injunction, unless an employer-employee relationship existed between the Government and the strikers, such uncertain and evasive authority should not be relied upon. The specific provisions of the present law should be retained.

## X.

### **Welfare funds should be trust funds, jointly administered by management and union representatives.**

**The Wagner Act did not provide any standards of conduct with respect to such welfare funds.**

**The present law requires that payments by employers to union representatives for insurance, pensions and other specified employee benefits should be held as trust funds and be jointly administered by union and management representatives, subject to resolution of any deadlock by a neutral third party designated by them or by the federal court.**

**The President's Bill is silent on the subject, discards all safeguards for the proper use of the funds, and leaves the parties to industrial warfare if they cannot agree.**

Accumulation of large amounts of money in union welfare funds, and the prospect of establishment of more such funds as a result of the widening of the area of mandatory collective bargaining to include employee insurance and pensions, create increasingly tempting possibilities of abuse of such funds.

To protect the intended beneficiaries of welfare funds, and to assure that administration of the accumulations shall not be perverted to seize and maintain union control over employees or to stifle democratic processes within unions, the present law requires that welfare funds (1) shall be trust funds, (2) shall be administered jointly by management and union representatives.

## XI.

**Benefits of the Act should be denied to Communist-dominated unions.**

The Wagner Act contained no provision directed at the elimination of Communist control of labor unions.

Under present law, unions cannot file a petition for certification as collective bargaining representatives, and cannot file unfair labor practice charges, unless the officials of the local union and its international affiliates have filed affidavits that they are not Communists.

The President's Bill, by omitting any reference to Communism, invites the return of Communists to dominant positions in national and local unions.

The present requirement of the non-Communist affidavit, while a move in the proper direction, is still markedly inadequate. The attitude of the Labor Board, in treating the filed affidavit as conclusive, permits evasion by the changing of the titles of Communist officers. Since the objectives of the regulation are beyond criticism, the requirements for compliance should be strengthened. Communist dominated labor organizations should not be entitled to the benefit of the full force of government aid.

## ARGUMENT.

### POINT I.

**Unions and their agents should be responsible for their unfair labor practices.**

The present National Labor Relations Act defines certain unfair labor practices by unions and their agents and holds them responsible for the elimination of such conduct.<sup>1</sup> The unions are now responsible for violation of the labor contract and for damages caused by certain of their strikes and secondary boycotts.<sup>2</sup> A standard of conduct with respect to payments received by union officials from employers for the benefit of employees is established.<sup>3</sup>

<sup>1</sup> Sections 8(b), and 10.

<sup>2</sup> Labor Management Relations Act, Sections 301, 303.

<sup>3</sup> Labor Management Relations Act, Section 302.

These provisions have been denounced by union officials as destructive of the right of employees to self-organization, to join unions and to bargain collectively through representatives of their own choosing.<sup>4</sup>

The record shows, however, that a system of checks and balances on abuses by unions has not been destructive of industrial democracy. By reason of the pressure of Court decisions and public opinion, an indirect and uncertain method for discouraging some union excesses was developed under the Wagner Act.

Long before the enactment of the present law, employees who sought the benefits of the Wagner Act themselves or through their unions by filing unfair labor practice charges against employers, were denied relief because they engaged in certain illegal conduct during the course of a labor dispute. Thus, sitdown strikers were subject to discharge and not entitled to reinstatement.<sup>5</sup> Strikers whose conduct amounted to violation of the laws against mutiny on board ship were not returned to their jobs.<sup>6</sup> Strikers who engaged in violence or threats thereof against persons and property were also held subject to discharge.<sup>7</sup> Employees who struck to compel an employer to violate the National Wage Stabilization Laws were denied reinstatement.<sup>8</sup> The reinstatement remedy was also withheld from employees who violated the no-strike provisions of the labor contract.<sup>9</sup> Employees who engaged in a strike to compel an employer to disregard the Board's certification of a union as bargaining representative were denied the protection of the Wagner Act and not reinstated.<sup>10</sup>

In some cases, denial of the benefits of the Wagner Act could be more directly applied to a wrongdoing union. Fraud and violence in obtaining membership could vitiate

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<sup>4</sup> The President's new labor Bill rejects these views in these respects: Secondary boycotts and strikes to compel employer disregard of a Board certification or a valid existing labor contract and over assignment of work (jurisdictional disputes) are unfair labor practices by unions.

<sup>5</sup> *NLRB v. Fansteel Metallurgical Corp.*, 306 U. S. 240.

<sup>6</sup> *Southern Steamship Company v. NLRB*, 316 U. S. 31.

<sup>7</sup> *International Nickel Co., Inc.*, 77 NLRB No. 39; *NLRB v. Perfect Circle Company*, 162 F. (2d) 566; *NLRB v. Fansteel Metallurgical Corp.*, 306 U. S. 240, 252-261.

<sup>8</sup> *The American News Company, Inc.*, 55 NLRB 1302. In this case, the Labor Board indicated that it would take cognizance only of conduct of an "aggravated character".

<sup>9</sup> *NLRB v. Sands Manufacturing Company*, 306 U. S. 332; *Scullin Steel Company*, 65 NLRB 1294; *Joseph Dyson & Sons, Inc.*, 72 NLRB 445.

<sup>10</sup> *Thompson Products, Inc.*, 72 NLRB 886.

the union's majority status so that it could not obtain an order compelling an employer to bargain collectively with it.<sup>11</sup> Nationally affiliated unions that received from an employer, illegal aid and assistance in organizing, were denied the right to represent the employees unless and until they were certified by the Board.<sup>12</sup> Any labor contract obtained by such illegally assisted unions was declared void. Unions that received the assistance of supervisors in organizing employees could not petition for an election, and if successful at an election it was set aside, nor could they obtain an order of the Board compelling an employer to bargain collectively with them.<sup>13</sup>

Did these restraints enslave labor? Did they impair the right of employees to self-organization, to join unions and to bargain collectively through representatives of their own choosing?

If unions are capable of engaging in abuses, as experience shows they are, that fact should be faced forthrightly and appropriate remedies for such conduct should be available. The inadequacy of a system of correcting wrongful conduct by merely withholding remedies under the law is plain. It does not provide against recurrence of the abuse or permit the application of appropriate measures to remedy the wrong. Furthermore, the question can be raised only if the wrongdoers—the union employees or the union—file charges of unfair labor practices against the employer.

Many of the decisions withholding the benefits of the Wagner Act from wrongdoing union employees, reasonably suggest that the unions involved were in a measure equally responsible for the wrongful conduct. The suggestion is also apparent in cases where the wrongdoer was found to be the employer. For example, where the union causes an employer to discharge employees under a closed shop contract because of their activity on behalf of a rival labor organization prior to the effective date of the closed shop contract, it participates in conduct which constitutes the unfair labor practices on the part of the employer.<sup>14</sup>

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<sup>11</sup> *NLRB v. Dadourian Exporting Co.*, 138 F. (2d) 891; *Fisher Body Corp.*, 7 NLRB 1083, 1092.

<sup>12</sup> *Louis F. Cassoff*, 43 NLRB 1193, enforced 139 F. (2d) 397.

<sup>13</sup> *Toledo Stamping & Manufacturing Co.*, 55 NLRB 865; *Robbins Tire & Rubber Co.*, 72 NLRB 157; *Parkchester Machine Corp.*, 72 NLRB 1410; *Wells Inc.*, 68 NLRB 545.

<sup>14</sup> See *Wallace Corp. v. NLRB*, 323 U. S. 248.

Another situation of joint wrongdoing occurs where an employer and a union, not representing a majority of the employees, collusively enter into a closed shop contract, and the employer, upon request of the union, discharges employees because of their failure or refusal to join that union.<sup>15</sup> Both union and employer participate in conduct which constitutes coercion of employees in the free choice of bargaining representative, and in discriminatory discharge.

Yet, in all these cases, the Wagner Act shielded the wrongdoing union from responsibility and prevented an investigation of the facts to determine whether the union involved was in any way responsible because under that law unfair labor practice charges could be filed, and the Board could proceed, against employers only.

**By defining the conduct of unions which constitutes unfair labor practices and providing for appropriate remedies to deter them, the existing law permits responsibility for the abuses to be placed where the facts of each case show that it should justly rest.**

The point is aptly illustrated by the recent decision of the Labor Board in the *Sunset Line & Twine Company* case.<sup>16</sup> There, strikers threatened non-strikers with bodily harm; a greatly outnumbered group of non-strikers were trailed for a considerable distance away from the plant by "an inimical superior force" of strikers thereby "clearly" conveying a threat of bodily injury; the strikers barred ingress to the plant and threatened those who attempted to enter with physical violence. Under the Wagner Act the question of discouraging such conduct might arise in this fashion: The strikers or their union would first have to file charges with the Labor Board against the employer claiming that he discriminated against them because of their union activity. If such discrimination was found to have occurred, the Board would then consider whether the illegal conduct of the strikers constituted "violence of an aggravated character"<sup>17</sup> so

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<sup>15</sup> See *Louis F. Cassoff*, 43 NLRB 1193, enforced 139 F. (2d) 397. In the case cited, the contract also provided for a compulsory check-off of dues in favor of the contracting union that received the benefit of the illegal assistance. The employer is ordered, in such a situation, not only to pay back pay to the discharged employees but also to reimburse all the employees for dues checked off on behalf of the union.

<sup>16</sup> 79 NLRB No. 207.

<sup>17</sup> *The American News Company*, 55 NLRB 1302, 1311.

as to require denying the strikers reinstatement or other relief appropriate to remedy discrimination by an employer. The question of union participation in the unlawful conduct of the strikers would not be considered at all, and in no event could responsibility be placed upon the union. Only the strikers could be required to bear the consequences of their illegal conduct by withholding from them the remedies of the statute. However, under the present law, the Labor Board can examine into the question of union responsibility for the illegal conduct because unfair labor practice charges can be filed against the union. In the case cited, the Labor Board found that the union's business agent planned and directed the strike (which was lawful) but instigated and participated in the illegal conduct of the strikers. Thus, responsibility was placed upon the union and its agent and an appropriate order issued against them.

In another recent case, the Labor Board also examined a union's responsibility for illegal conduct of strikers and there found that the union was not responsible for such activities of the strikers.<sup>18</sup>

The unfair labor practices by unions and their agents are defined in Section 8(b) of the present Act. The use of restraint and coercion by unions to compel employees to join their ranks and activities is proscribed. This restriction was enacted to eliminate "physical violence and intimidation by unions or their representatives as well as the use by unions of threats of economic action against specific individuals in an effort to compel them to join."<sup>19</sup> The Labor Board has held that this restriction on coercive union conduct does not by itself limit the right of unions to strike. The Board said,<sup>20</sup>

"Congress primarily intended to proscribe *coercive conduct* which sometimes accompanies a strike, but not the strike itself. . . Congress sought to fix the rules of the game, to insure that strikes and other organizing activities of employees were conducted peaceably by persuasion and propaganda and not by physical force or threats of force, or of economic reprisal."

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<sup>18</sup> *Perry Norvell Co.*, 80 NLRB No. ...., 23 LRRM 1061.

<sup>19</sup> *National Maritime Union*, 78 NLRB No. 137.

<sup>20</sup> *Perry Norvell Company*, 80 NLRB ...., 23 LRRM 1061, 1062.

The remedy applicable for the unfair labor practice of restraint and coercion by unions is to order the offenders to cease and desist from restraining and coercing the employees in the exercise of their right to refrain from union activities and, affirmatively, to post notices of compliance.<sup>21</sup> For an illegal refusal to bargain collectively with an employer, for causing an employer to discriminate against employees, for secondary boycott and jurisdictional strikes, for imposing excessive fees as a condition precedent to union membership when there is a valid union shop agreement in effect, and for featherbedding, unions are subject to appropriate cease and desist orders which may direct that they refrain from such illegal conduct and prescribe affirmative action to be taken by them in order to effectuate the policies of the Act.<sup>22</sup> Such affirmative action may require the union, in appropriate cases, to bargain collectively with an employer, to pay back pay to employees who have suffered loss of pay on account of discriminatory discharges caused by the union, or to reimburse an employer to the

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<sup>21</sup> The order in *Sunset Line & Twine Company*, 79 NLRB No. 207, directed that the unions, their officers representatives and agents, shall:

“1. Cease and desist from:

(a) Restraining and coercing employees of Sunset Line and Twine Company, Petaluma, California, in the exercise of their right to refrain from any or all concerted activities, as guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Post in conspicuous places in the business office of the International in San Francisco, California, and in the business office of Local 6 in San Francisco, California, and in the business office, if any of the Petaluma Unit of Local 6, Petaluma, California, where notices of communications to members are customarily posted, copies of the notice attached hereto as an Appendix. . . . Copies of the notice, to be furnished by the Regional Director for the Twentieth Region, shall, after being signed by official representatives of the International, of Local 6, and of the Petaluma unit, respectively, be posted by these unions immediately upon receipt thereof and maintained by them for a period of sixty (60) consecutive days thereafter. Reasonable steps shall be taken by these respondents to insure that said notices are not altered, defaced or covered by any other material;

(b) Mail to the Regional Director of the Twentieth Region signed copies of the notice, attached hereto as an Appendix, for posting, the Company willing, on the bulletin board of the Sunset Line and Twine Company, where notices to employees are customarily posted, where such notice shall be posted and maintained for a period of sixty (60) days thereafter. Copies of the notice, to be furnished by the Regional Director for the Twentieth Region, shall after being signed as provided in Paragraph 2 (a) of this Order, be forthwith returned to the Regional Director for said posting;

(c) Notify the Regional Director for the Twentieth Region in writing within ten (10) days from the date of this Order what steps the respondents have taken to comply herewith.”

<sup>22</sup> Amended Act, Section 10(c).

extent that he had been compelled to pay for featherbedding, and to post notices of compliance.<sup>23</sup>

These remedies, to be applied in case of union unfair labor practices, follow the pattern of remedies applicable to employers for unfair labor practices committed in violation of Section 8(a) of the amended Act. Such remedies when applied to employers have been held reasonable.

In *Republic Steel Corp. v. NLRB*,<sup>24</sup> the Supreme Court said,

“We think that affirmative action to ‘effectuate the policies of this Act’ is action to achieve the remedial objectives which the Act sets forth. Thus the employer may be required not only to end his unfair labor practices; he may also be directed affirmatively to recognize an organization which is found to be the duly chosen bargaining representatives of his employees; he may be ordered to cease particular methods of interference, intimidation or coercion, to stop recognizing and to disestablish a particular labor organization which he dominates or supports, to restore and make whole employees who have been discharged in violation of the Act, to give appropriate notice of his compliance with the Board’s order, and otherwise to take such action as will assure to his employees the rights which the statute undertakes to safeguard. *These are all remedial measures.*” (Emphasis added).

By the same token, they are, manifestly, equally remedial and reasonable when applied to unfair labor practices by unions.

Furthermore, the unions, like employers, have an additional safeguard against the imposition of unreasonable restraints because they have been found guilty of an unfair labor practice. The order issued against them must be restricted to the violation found by the Labor Board to have been committed; general cease and desist orders are invalid. For example, if a union is found guilty of an

<sup>23</sup> Requiring an employer to pay back pay on account of a discriminatory discharge has been sustained as reasonable. In *Social Security Board v. Nierotko*, 327 U. S. 364, 365, the Court said, “‘Back pay’ is not a fine or penalty imposed on the employer by the Board.” It follows that requiring unions to pay back pay when they have caused a discriminatory discharge is also reasonable.

<sup>24</sup> 311 U. S. 7, 12.

illegal refusal to bargain collectively with an employer, it cannot be ordered to stop restraining and coercing employees in the exercise of their right to refrain from union activity unless there is proof of danger that it will engage in such conduct or that the illegal refusal to bargain is related to restraint and coercion of the employees. The Supreme Court established this principle under the Wagner Act when it said:<sup>25</sup>

“We hold only that the National Labor Relations Act does not give the Board an authority, which courts cannot rightly exercise, to enjoin violations of all the provisions of the statute merely because the violation of one has been found. To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past.”

The amended Act empowers the Labor Board to issue orders against unions requiring them to cease and desist from the specified unfair labor practices and to take affirmative action to remedy such conduct, and to secure enforcement of such orders by the United States Court of Appeals.<sup>26</sup> Such a grant of authority does not authorize the Board to impose penalties upon unions for the purpose of compelling them to stop unfair labor practices.<sup>27</sup> The Supreme Court has said that “The power to command affirmative action is remedial, not punitive.”<sup>28</sup> Thus, it is abundantly clear that the administrators of the present law cannot impose fines, penalties or forfeitures on unions because they have engaged in unfair labor practices.

For all of the foregoing reasons, the charge that the existing Act is a “slave labor law”, because unions are made responsible for the specific unfair labor practices, is completely unfounded. The provisions subjecting them to remedial sanctions for abuses defined as unfair labor practices should be continued in full force.

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<sup>25</sup> *NLRB v. Express Publishing Co.*, 312 U. S. 426, 437.

<sup>26</sup> Amended Act, Section 10(c) and (e).

<sup>27</sup> *Consolidated Edison Co. v. NLRB*, 305 U. S. 197, 235, 236.

<sup>28</sup> *Republic Steel Corp. v. NLRB*, 311 U. S. 7, 12.

## POINT II.

**The tyranny of the closed shop should not be revived.**

The closed shop is outlawed by the present statute.<sup>29</sup> A *union shop* is permissible if the requirements of the Act are satisfied.<sup>30</sup> If the union shop is authorized and that type of agreement executed by the employer and the union, the employees who are not members of the union must become members of the union thirty days after the effective date of the agreement or forfeit their jobs. But they cannot lose their jobs because of failure to join the union, if union membership was not made available to them on the same terms and conditions generally applicable to members. They cannot be subject to discriminatory treatment in order to become union members. Nor can they be required to pay excessive fees as a condition for acquiring union membership.<sup>31</sup> Employees can be deprived of their jobs under the union shop only for non-payment of union initiation fees and periodic dues.<sup>32</sup> Disagreement with the views or position of the union or its officials on any subject cannot result in the loss of their jobs.

The unions claim that these regulations cripple them and threaten their existence. They assert that an unregulated and unrestricted closed shop is necessary if unions are to survive at all.

The record amply demonstrates that these claims are erroneous.

Union leaders fail to cite a single instance where the present ban against the closed shop has been fatal to a labor union.

The growth of unions during the past fifty years has been notable. Mr. Justice Frankfurter in a concurring opinion sustaining the constitutionality of state bans against the closed shop<sup>33</sup> pointed out:

“In the past fifty years the total number of employed, counting salaried workers and the self-em-

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<sup>29</sup> Amended Act, Section 8(a) (3).

<sup>30</sup> Amended Act, Section 8(a) (3).

<sup>31</sup> Amended Act, Section 8(b) (5).

<sup>32</sup> Amended Act, Section 8(b) (2).

<sup>33</sup> *AFL v. Sash & Door Co.*, 93 L. Ed. 209, 214.

ployed but not farmer or farm laborers, has not quite trebled, while total union membership has increased more than thirty-three times; at the time of the open-shop drive following the First World War, the ratio of organized to unorganized non-agricultural workers was about one to nine, and now it is almost one to three.’<sup>34</sup>

During the last war, unions thrived upon maintenance-of-union-membership clauses and other forms of union security provisions less monopolistic than the closed shop. Union growth has been achieved, rather, through laws which protected and supported the union’s principal function, namely, to act as bargaining representative of employees, and widened the scope of activity in that capacity.

Under the present law as under the Wagner Act, that authority of the union cannot be undermined by an employer or dissident groups of employees. It has exclusive power and authority to bargain collectively with the employer with respect to wages, hours and terms and conditions of employment, and recognition of its rights in that regard

<sup>34</sup> In footnote 3 of his opinion, Mr. Justice Frankfurter shows the following:

“In the following table, ‘union membership’ includes all members of AFL, CIO, and independent or unaffiliated unions, including Canadian members of international unions with headquarters in the United States; the ‘employment’ figures include all non-agricultural employees (i.e., wage and salary workers), non-agricultural self-employed, unpaid family workers, and domestic-service workers.

| Year | Union<br>Membership<br>(thousands) | Employment<br>(thousands) |
|------|------------------------------------|---------------------------|
| 1898 | 467.....                           | 17,826                    |
| 1900 | 791.....                           | 20,202                    |
| 1903 | 1,824.....                         | 22,871                    |
| 1908 | 2,092.....                         | 27,031                    |
| 1913 | 2,661.....                         | 33,456                    |
| 1918 | 3,368.....                         | 32,314                    |
| 1923 | 3,629.....                         | 35,505                    |
| 1928 | 3,567.....                         | 28,670                    |
| 1933 | 2,857.....                         | 34,530                    |
| 1938 | 8,265.....                         | 45,390                    |
| 1943 | 13,642.....                        | 50,400                    |
| 1948 | 15,600.....                        |                           |

“The ‘union-membership’ totals, except for 1948, are taken from Membership of Labor Unions in the United States, U. S. Dept. of Labor, Bureau of Labor Statistics (mimeographed pamphlet); the ‘union-membership’ and ‘employment’ totals for 1948 are preliminary estimates by the Bureau of Labor Statistics. The ‘employment’ figures for years up to 1928 are taken from Employment and Unemployment of the Labor Force, 1900-1940, 2 Conference Board Economic Record 77, 80 (1940); ‘employment’ figures for years since 1929, except 1948, and the basis upon which they are estimated may be found in Technical Note, 67 Monthly Labor Rev. No. 1, p. 50 (1948).”

is mandatory. Individual employment contracts between employer and employees must give way to this bargaining authority of the union.<sup>35</sup> The employer is powerless to alter conditions of employment without its consent.<sup>36</sup> Nor can he undercut its authority as bargaining representative.<sup>37</sup> An employer cannot yield to the voluntary requests of employees to ignore their bargaining representative and agree with them on wages.<sup>38</sup>

Even the rights of the employees to affect the status of the union as bargaining representative is limited. Once they granted such authority at a Labor Board election, the employees under the Wagner Act could not revoke it for a reasonable period (normally one year) from the date of the Board's certification of the union.<sup>39</sup> Under the present law no election can be conducted during the twelve month period following the last valid election conducted by the Board.<sup>40</sup> Employees cannot secure adjustment of their grievance in a manner inconsistent with the existing labor contract and the union is entitled to an opportunity to be present when individual grievances are adjusted.<sup>41</sup> Employees cannot obtain a "free ride" by refusing to pay toward the union's financial obligations because, if a valid union shop agreement is entered into by the employer and the union, they are subject to discharge for non-payment of initiation fees and regular dues.

In addition to these bulwarks of its authority, the field for the exercise of union power as bargaining representative has recently been held to include merit increases, insurance benefits and pensions and retirement plans.<sup>42</sup>

As staunch a friend of labor as Mr. Justice Brandeis vigorously championed "the objections, legal, economic and social against the closed shop" and regarded it as "the the exchange of the tyranny of the employer for the tyranny of the employees."<sup>43</sup>

<sup>35</sup> *J. I. Case Co. v. NLRB*, 321 U. S. 332.

<sup>36</sup> *May Department Stores Co. v. NLRB*, 326 U. S. 376.

<sup>37</sup> *Frank Brothers Company v. NLRB*, 321 U. S. 702; *NLRB v. P. Lorillard Co.*, 314 U. S. 512.

<sup>38</sup> *Medo Photo Supply Corp. v. NLRB*, 321 U. S. 678.

<sup>39</sup> *NLRB v. Century Oxford Manufacturing Corp.*, 140 F. (2d) 541; *NLRB v. Appalachian Electric Power Co.*, 140 F. (2d) 217.

<sup>40</sup> Amended Act, Section 9(c)(3).

<sup>41</sup> Amended Act, Section 9(a).

<sup>42</sup> *J. H. Allison & Co. v. NLRB*, 165 F. (2d) 766, cert. den. 69 S. Ct. 31; *Inland Steel Co.*, 77 NLRB 1; *W. W. Cross Co.*, 77 NLRB No. 188.

<sup>43</sup> Concurring opinion of Mr. Justice Frankfurter, *AFL v. Sash & Door Co.*, 93 L. Ed. 209.

A union's strength and growth should depend on its ability to persuade allegiance on the basis of effective performance of its primary function as bargaining representative rather than on power to compel obedience by reason of economic monopoly over jobs. A return to absolute union control over hiring is not warranted by the record, particularly at a time of vigorous union political activity. Though professedly used for democratic purposes, there is substantial evidence that the concentrated power of the closed shop has been arbitrarily employed. The record shows that such power has been used:

1. To interfere with political freedom.<sup>44</sup>
2. To aid racial discrimination.<sup>45</sup>
3. To suppress fair criticism.<sup>46</sup>
4. To punish for attacking an allegedly unlawful contract.<sup>47</sup>
5. To punish for testifying against the union.<sup>48</sup>
6. To punish for activities on behalf of another union prior to the effective date of the closed shop.<sup>49</sup>
7. To punish for activity on behalf of a rival at the expiration of the closed shop contract.<sup>50</sup>
8. To fraudulently deprive employees of their jobs.<sup>51</sup>

Theoretically, the victim of arbitrary use of the closed shop may have recourse to the courts to test the validity of his expulsion from the union and the loss of his job. Practically, and in most instances, he is reluctant to press the issue in court and lacks the financial resources to do so. He may have difficulty enough finding a job if he is in an industry or community highly organized by the same union or its affiliates.

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<sup>44</sup> *De Mille v. American Federation of Radio Artists*, 175 P. (2d) 851; Cf. *James v. Marinship Corp.*, 25 Cal. (2d) 721, 155 P. (2d) 329; *Williams v. International Brotherhood of Boilermakers*, 27 Cal. (2d) 586, 165 P. (2d) 903.

<sup>45</sup> *James v. Marinship Corp.*, 25 Cal. (2d) 721, 155 P. (2d) 329; *Williams v. International Brotherhood of Boilermakers*, 27 Cal. (2d) 586, 165 P. (2d) 903.

<sup>46</sup> *John Wood Mfg. Co.*, 1 Labor Arb. Rep. 43.

<sup>47</sup> *Trailmobile Co. v. Whirls*, 331 U. S. 40.

<sup>48</sup> *Link-Belt Speeder Corp.*, 2 Lab. Arb. Rep. 338, 343.

<sup>49</sup> *Wallace Corp. v. NLRB*, 323 U. S. 248.

<sup>50</sup> *Entland Court Owner's Inc.*, 46 NLRB 1040.

<sup>51</sup> *Monsieur Henri Wines*, 44 NLRB 1310.

## POINT III.

### **Secondary boycotts and jurisdictional strikes should be restrained.**

Under the present Act, secondary boycotts and jurisdictional strikes by unions are unfair labor practices.<sup>52</sup> If charges of such conduct are filed and reasonably believed to be well founded, the Labor Board is empowered to obtain a federal court injunction against such activities pending the Board's final determination of the case.<sup>53</sup> Persons injured by such conduct have the right to sue the union in court for damages suffered thereby.<sup>54</sup>

These provisions have been criticized by unions as outlawing traditional union methods for organizing and improving wages and working conditions of employees, and as restoring "government by injunction."

The criticism based on traditional union practices cannot be justified. Tradition has not been sufficient to thwart warranted regulation. Thus, organizing from the top down was traditional with some unions. The technique consisted of first securing a closed shop contract from the employer and requiring the employees to join or lose their jobs. The practice was defended on the basis of the employee's self-interest in the betterment of wages and conditions and the maintenance of union standards. Nevertheless, it was outlawed by the Wagner Act.

The right of government to confine the area of industrial warfare by eliminating secondary boycotts is beyond question. The union's right of free speech is not thereby denied.<sup>55</sup> One Court has summarized the authority of government as follows:<sup>56</sup>

"The constitutional right of free speech and free press postulates the authority of Congress to enact

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<sup>52</sup> Amended Act, Section 8(b) (4) outlaws such conduct where the objects thereof are, briefly: to force a self-employed person to join a union or employer organization, to force a cessation of business between two persons, to force another employer to bargain with a union unless it has been certified by the Board, to force dishonor of a Board certification and to compel assignment of work to certain union members.

<sup>53</sup> Amended Act, Section 10(k) (1).

<sup>54</sup> Labor Management Relations Act, 1947, Section 303.

<sup>55</sup> *Carpenters & Joiners Union of America v. Ritter's Cafe*, 315 U. S. 723; *United Brotherhood of Carpenters & Joiners of America v. Sperry*, C. C. A. 10th, Nov. 2, 1948, 23 LRRM 2040.

<sup>56</sup> *United Brotherhood of Carpenters & Joiners of America v. Sperry*, *supra*, note 55, p. 2044.

legislation reasonably adapted to the protection of interstate commerce against harmful encroachments arising out of secondary boycotts.”

The present statute limits the exercise of union economic pressure but leaves open to the unions all other methods of communication concerning the dispute except secondary strikes and secondary picketing. The Supreme Court<sup>57</sup> upon sustaining an injunction against secondary picketing said,

“Restriction of picketing to the area of the industry within which a labor dispute arises leaves open to the disputants other traditional modes of communication.”

Secondary boycotts in the hands of large unions and allied union groups have caused serious economic injury to persons not interested in the dispute. Small business and the public have been the principal victims of such activity.

A recent case demonstrates the need for protection.<sup>58</sup> Local 74, United Brotherhood of Carpenters & Joiners Union was engaged in a labor dispute with Watson's Specialty Store, a substantial chain store business engaged in the sale and installation of wall and floor coverings. One Stanley purchased an old house and engaged a contractor to renovate it. The contractor employed union carpenters. It became necessary to obtain wall and floor coverings for the house. However, the only place where suitable materials could be found was Watson's Specialty Store, which insisted on installing the coverings it sold. Thereupon, Watson's sent its employees to do that work. The union then ordered the contractor's employees off the job and Stanley's partially renovated house remained unfinished. Before enactment of the present law this situation would have continued until Watson's and the union settled the dispute, in which neither Stanley nor his contractor had or were permitted an interest. However, the situation was remedied under the present statute by the filing of charges of unfair labor practices against the union. The

<sup>57</sup> *Carpenters & Joiners Union of America v. Ritter's Cafe*, 315 U. S. 723, 727, 728.

<sup>58</sup> *Local 74 United Brotherhood of Carpenters & Joiners (Watson's Specialty Store)*, 80 NLRB No. 91.

Labor Board found the secondary boycott affecting Stanley's house illegal and ordered the union to cease and desist therefrom.

Speedy and effective government intervention through the Labor Board's application to the Federal Courts for a temporary injunction, pending decision of the case, on the basis of the Board's reasonable belief that a proscribed secondary boycott is being waged, is essential to limit the spread of industrial warfare and the economic injury—to innocent parties and to the national economy—resulting therefrom. Such widespread effect of the secondary boycott was pointed out by the United States Court of Appeals for the Tenth Circuit.<sup>59</sup>

“And the general practice of establishing and maintaining secondary boycotts of that kind multiplied or extended throughout the country would necessarily effect a reduction in the flow in interstate commerce of both raw materials and manufactured commodities.”

Because only the government through the Labor Board can invoke the injunctive remedy, the possibilities of abuse are substantially minimized. The statutory right of a private party to sue for damages caused by secondary boycott does not include injunctive relief.<sup>60</sup> The remedy in damages is inadequate in most instances because the loss is usually substantial and irreparable.

The claim that “government by injunction” has been restored is unwarranted.

In the first six months of operation of the law, the Labor Board filed nine petitions in Federal Courts to enjoin secondary boycotts. For the eighteen month period of operation, approximately eighteen such applications were made of which four were denied.<sup>61</sup>

The statutory ban on secondary boycotts is of limited effect. It does not affect strikes against the primary employer for recognition or economic reasons. The unions are also free to exert pressure against secondary employers

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<sup>59</sup> *United Brotherhood of Carpenters & Joiners v. Sperry*, 23 L. R. R. 2040, 2044.

<sup>60</sup> *Amalgamated Assoc. etc. v. Dixie Motor Coach Corp.*, C. C. A. 8th, 23 LRRM 2093.

<sup>61</sup> Based on tabulation of recorded cases. Publication of statistics on this subject by the Labor Board has not been found.

provided such conduct does not constitute a strike against such employer or inducing or encouraging his employees to cease work. Persuasion addressed to the secondary employer or his supervisors or customers is not barred. And an employer who undertakes to act as subcontractor for the primary employer during the strike against the latter may also be subjected to the full pressure of the union's strike and economic strength.<sup>62</sup>

Jurisdictional strikes over assignment of work and the strike or boycott to compel disregard of the Labor Board certification of bargaining representative cannot be justified. In the latter case, an employer who yields to the union's pressure and defies the Board's certification violates the law. Yet, compliance with the Board's certification may be fatal to his business by reason of the economic pressure of the rival union.

In such a situation, prompt government intervention is required to compel recognition of the Board's certification and to forestall substantial injury to the business caught between rival unions. The striking union undermines the employee's free choice of bargaining representative, evidenced by the certification, as well as the collective bargaining process.<sup>63</sup>

## POINT IV.

**Unions, as well as management, should be obligated to bargain collectively in good faith.**

The present Act obligates the union as well as the employer to engage in collective bargaining in good faith when it has been designated as bargaining representative by a majority of the employees. Violation of that obligation by the union is an unfair labor practice. The mutual aspects of the procedure of collective bargaining are expressed in the portion of the statute which provides:<sup>64</sup>

“For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representatives of the em-

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<sup>62</sup> *Douds v. Metropolitan Federation of Architects*, 75 F. Supp. 672.

<sup>63</sup> *NLRB v. Draper Corp.*, 145 F. (2d) 199; *NLRB v. Clinchfield Coal Corp.*, 145 F. (2d) 66.

<sup>64</sup> Amended Act, Section 8(d).

ployees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession \* \* \*,”

Court decisions under the Wagner Act pointed out that collective bargaining required that labor and management deal with each other in good faith and that a mind “hermetically” sealed on either side of the bargaining table against agreement foreclosed the possibility that an agreement could be reached.

Thus, in *Globe Cotton Mills v. NLRB*,<sup>65</sup> the Court said,

“We believe there is a duty on both sides, though difficult of legal enforcement, to enter into discussion with an open and fair mind, and sincere purpose to find a basis of agreement touching wages, and hours and conditions of labor, and if found to embody it in a contract as specific as possible which shall stand as a mutual guaranty of conduct and as a guide for the adjustment of grievances.”

In *NLRB v. The Boss Manufacturing Co.*,<sup>66</sup> the Court said,

“Collective bargaining, as contemplated by the Act, is a procedure looking toward the making of a collective agreement between the employer and the accredited representative of his employees concerning wages, hours and other conditions of employment. Collective bargaining requires that the parties involved deal with each other with an open and fair mind and sincerely endeavor to overcome obstacles or difficulties between the employer and the employees to the end that employment relations may be stabilized and obstruction to the free flow of commerce prevented.”

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<sup>65</sup> 103 F. (2d) 91, 94.

<sup>66</sup> 118 F. (2d) 187.

These pronouncements of the courts plainly establish that genuine collective bargaining is a two-way street requiring give and take on both sides of the conference table. This standard of conduct is embodied in the requirement of the present statute that both sides:

1. Meet and confer in good faith;
2. Execute a written contract upon the request of either party if agreement is reached.

A union that submits demands on a "take it or leave it" basis, bolstered with a threat of a strike in event of failure to comply with its demands, defies the purposes of the Act because "the Act was designed to encourage collective bargaining as a substitute for strike action."<sup>67</sup>

The right to function as collective bargaining representative carries with it a corresponding duty to perform that function genuinely and in good faith. Unions that fail in this respect disrupt the collective bargaining procedure and foster unrest and industrial strife. Such conduct flies in the face of the many decisions which enforce the exclusive power and authority of the bargaining representative and, in effect, violates the duty of fair representation owed to the employees in the bargaining unit.<sup>68</sup>

The Wagner Act imposed no duty on the union to bargain in good faith. Its refusal to bargain in good faith removed "the possibility of negotiations."<sup>69</sup> Since the union could not be ordered to cease and desist from such conduct and to bargain collectively, the situation created by the union was left unremedied and fraught with the danger of industrial strife substantially undermining interstate commerce. The purposes of the Act were thereby defeated.

The present statute fixes the union's duty to perform its bargaining function in good faith as in the case of employers. The union's refusal to bargain collectively is also an unfair labor practice subject to remedial order of the Labor Board.<sup>70</sup> Enforcement of performance of that obligation on the part of unions presents no insurmountable difficulties. The standard of conduct in this regard has

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<sup>67</sup> *National Electric Products Corp.*, 80 NLRB No. ...., 23 LRRM 1148.

<sup>68</sup> See *The Wallace Corp. v. NLRB*, 323 U. S. 248, 255; *Steele v. Louisville & Nashville R. E. Co.*, 323 U. S. 192, 201, 202

<sup>69</sup> See *Times Publishing Company*, 72 NLRB 676, 683.

<sup>70</sup> Amended Act, Section 8(b) (3).

already been charted by the many decisions with respect to employers.

The Labor Board has said with respect to Section 8(d) of the present statute:<sup>71</sup>

“The legislative history of these provisions clearly indicates that it was the purpose of Congress to impose upon labor organizations the same duty to bargain in good faith which had been imposed upon employers in Section 8 (5) of the Wagner Act, and continued in Section 8(a) (5) of the amended Act. Moreover, the standards and tests set forth in Section 8(d), applicable to both employers and unions, closely paraphrase those established in decisions of the Board and the courts in recent years. Such decisions, although they dealt primarily with employers’ responsibility to bargain collectively under the Wagner Act, are nevertheless significant guideposts in determining the collective bargaining obligations of unions under Section 8(b) (3).”

The presently effective definition of collective bargaining stabilizes labor relations in two other respects:

1. The parties to a contract are obligated to bargain collectively with respect to “questions arising thereunder.”

2. During the contract period, neither party is obligated to discuss modifications of its terms unless the contract provides for reopening thereof.

The powers of the union as bargaining representative have been compared to “those possessed by a legislative body to create and restrict the rights of those whom it represents.”<sup>72</sup> The agreement negotiated with the employer by the bargaining representative establishes the rules and standards which shall govern the employees, employer and union during the contract term. The Supreme Court has said in this regard:<sup>73</sup>

“The negotiations between union and management result in what often has been called a trade

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<sup>71</sup> *National Maritime Union*, 78 NLRB No. 137, 22 LRRM 1289, 1296.

<sup>72</sup> *Steele v. Louisville & Nashville R. R. Co.*, 323 U. S. 192, 202.

<sup>73</sup> *J. I. Case Co. v. NLRB*, 321 U. S. 332, 335.

agreement, rather than in a contract of employment. Without pushing the analogy too far, the agreement may be likened to the tariffs established by a carrier, to standard provisions prescribed by supervising authorities for insurance policies, or to utility schedules of rates and rules for service, which do not of themselves establish any relationships but which do govern the terms of the shipper or insurer or customer relationship whenever and with whomever it may be established.”

The trade agreement, therefore, is in effect a charter of labor relations, fixing wages, hours and terms of employment and providing and guiding, through its grievance and arbitration procedures, the course that collective bargaining should pursue.<sup>74</sup> Such a charter must be given some fair degree of permanence, and in point of time that period should be fixed by the parties themselves as stated in the terms and provisions of the charter.

When that charter is about to expire pursuant to its terms, proposals for modifications and changes are appropriate. The emphasis should be on conferences and negotiations in good faith rather than on industrial strife. The present provisions for a sixty day notice of intention to terminate or modify an expiring labor contract, during which time the parties must meet and negotiate without strike or lockout, has such an effect.<sup>75</sup>

## POINT V.

### **Management should retain the right to speak freely.**

The law today insures management's right to speak freely to and with its employees. The only limitation on this right is that, in so speaking, management must not make threats of reprisal or force or promises of benefit.<sup>76</sup>

The privileges of the First Amendment have been enjoyed by employees and unions, and their right to speak freely on labor organization was guaranteed in the Wagner Act and continued in the present act. Management ob-

<sup>74</sup> *Timken Roller Bearing Co. v. NLRB*, 161 F2d 949.

<sup>75</sup> Amended Act, Section 8(d).

<sup>76</sup> Amended Act, Section 8(c).

tained the same right, not by virtue of Labor Board ruling or court decision, but by express provision in the statute.

That protection must not be withdrawn or weakened. If unions are to continue, as well they should, with the right to speak freely, it is imperative that any fair labor law grant the same right to management. One of the foremost lawyers representing labor wrote in the official organ of the American Federation of Labor that, "if freedom of speech is to survive for trade unions and their members, it must not be denied, directly or indirectly, to employers."<sup>77</sup>

Denial of the basic right of free speech to either labor or management vitiates the constitutional right which extends to all persons.<sup>78</sup> The right of employees to self-organization is meaningless without freedom of speech. "Of that freedom, one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom."<sup>79</sup>

The discussion of labor disputes and the benefits and burdens of joining a union fall within the ambit of the free speech privilege. In *Hague v. Committee for Industrial Organization*,<sup>80</sup> the Supreme Court held that freedom to disseminate information concerning the National Labor Relations Act, and to assemble peaceably for discussion of the advantages and disadvantages of union organization, was a constitutional privilege which could not be abridged by the states.

In *Thornhill v. Alabama*,<sup>81</sup> the court said,

"In the circumstances of our times, the dissemination of information concerning the facts of a labor dispute must be regarded as within the area of free discussion that is guaranteed by the constitution."

The privilege is so vital and an integral part of our form of government that it is not necessarily lost because of inaccuracy of views expressed, vilification, exaggeration or even false statements and misconduct or hostility of the speaker.<sup>82</sup>

It is not limited to ineffective speech or a mere description of facts, but includes the right that speech shall be

<sup>77</sup> Joseph Padway, Esq. in *The Federationist*, June 1944, P. 28.

<sup>78</sup> *Midland Steel Products Corp. v. NLRB*, 123 F 2d 800, 804.

<sup>79</sup> *Palko v. Connecticut*, 302 U. S. 319, 327.

<sup>80</sup> 307 U. S. 496. The Court also pointed out (p. 512) that "... it is clear that the right peaceably to assemble and discuss these topics, and to communicate respecting them, whether orally or in writing, is a privilege in citizenship of the United States which the Amendment protects."

<sup>81</sup> 310 U. S. 88, 102.

<sup>82</sup> *Cantwell v. Connecticut*, 310 U. S. 296; *American Federation of Labor v. Swina*, 312 U. S. 321; *Thornhill v. Alabama*, 310 U. S. 88.

effective and persuasive so long as the appeal is to reason. The free speech privilege, together with all these incidents of speech, extends to employers, as well as unions, in the discussion of union organization.

In *Thomas v. Collins*,<sup>83</sup> the Supreme Court said,

“The First Amendment is a charter for government, not for an institution of learning. ‘Free trade in ideas’ means free trade in the opportunity to persuade to action, not merely to describe facts. Cf. *Abrams v. United States*, 250 U. S. 616, 624, and *Gitlow v. New York*, 268 U. S. 652, 672 dissenting opinions of Mr. Justice Holmes. Indeed the whole history of the problems shows that it is to the end of preventing action that repression is primarily directed and to preserving the right to urge it that the protections are given.

“Accordingly, decision here has recognized that employers’ attempts to persuade to action with respect to joining or not joining unions are within the First Amendment’s guaranty. *Labor Board v. Virginia Electric & Power Co.*, 314 U. S. 469. Decisions of other Courts have done likewise. When to this persuasion other things are added which bring about coercion, or give it that character, the limit of the right has been passed. Cf. *Labor Board v. Virginia Electric & Power Co.*, *supra*. But short of that limit the employer’s freedom cannot be impaired. The constitution protects no less the employees’ converse right. Of course espousal of the cause of labor is entitled to no higher constitutional protection than the espousal of any other lawful cause. It is entitled to the same protection.”<sup>84</sup>

The history of management’s privilege of free speech before the Labor Board establishes the need for legislation which will protect that privilege and serve as a guide for the accommodation of the purposes of Act to the requirements of the First Amendment. The Board “has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore”<sup>85</sup>

<sup>83</sup> 323 U. S. 516, 537, 538.

<sup>84</sup> Mr. Justice Jackson stated in a concurring opinion that he would stop or punish employer’s speech “only rarely and when” it was “inseparable” from discriminatory discharges or intimidation.

<sup>85</sup> *Southern Steamship Co. v. NLRB*, 316 U. S. 31, 47.

the Bill of Rights. With "excessive emphasis upon its immediate task", the Board denied management the free speech privilege.

Under the Wagner Act, the Labor Board first forbade free discussion of the subject of union organization between employer and employee, the persons primarily interested and concerned during a union's organizational drive. "Almost any expression" of opinion by an employer not strictly neutral was ruled illegal although honestly believed. The Labor Board took the extreme position that<sup>86</sup>

"... in the normal relationship between employer and employee, almost any expression of opinion by an employer indicating to those who depend on his continued good will for their livelihood an unequivocal disapproval of their forming or joining a labor organization characteristically carries home to employees an implied threat of unlawful discrimination for noncompliance with the employer's desires."

An employer who advised his employees that union organizers urging them to join their organization were Communists or racketeers was held guilty of coercion and the possibility that the accusations might be correct was not considered.<sup>87</sup>

Some Courts were prepared to give finality to the Board's rulings on the free speech issue as the finding of experts, particularly versed in the subject matter.<sup>88</sup>

<sup>86</sup> *Southern Colorado Power Co.*, 13 NLRB 699, 711.

<sup>87</sup> *Luckenbach Steamship S. S. Co.*, 8 NLRB 1280; *Freisinger d/b/a North River Yarn & Dyers*, 10 NLRB 1043; *Reliance Manufacturing Co.*, 28 NLRB 1051; *Model Blouse Co.*, 15 NLRB 133; See *Agar Packing & Provision Corp.*, 58 NLRB 738.

<sup>88</sup> In *NLRB v. American Tube Bending Co.*, 134 F. (2d) 993, 994, the Court said:

"Had it not been for the decision of the Supreme Court in *National Labor Relations Board v. Virginia Electric & Power Company*, 314 U. S. 469, 62 S. Ct. 344, 86 L. Ed. 348, we might have considered some of that court's earlier decisions as requiring us to grant an enforcement order in the case at bar. Those decisions might be interpreted as holding that any address or other communication from an employer made directly to his employees may have, and ordinarily will have, a double aspect; on the one hand, it is an expression of his own beliefs and an attempt to persuade his employees to accept them; on the other, it is an indication of his feelings which his bearers may believe will take a form inimical to those of them whom he does not succeed in convincing. Insofar as it is the first, the Constitution protects him; insofar as it is the second, it does not. The Board, being composed of those especially versed in the subject matter, must decide how far the second aspect predominates, and if they conclude that it will seriously coerce the employees' freedom of choice, they may forbid it."

However, the force of Court decisions compelled the Board to revise its position and give more than lip-service to the free speech privilege when applied to management.<sup>89</sup> The Board then ruled the employer's speech was illegal if it was coercive on its face or made coercive by surrounding circumstances which showed that it was part of a pattern of coercive conduct.<sup>90</sup> The latter concept became known as the "totality of conduct" doctrine.

The application of this doctrine in particular cases again resulted in the unwarranted restriction of the free speech privilege. The Board found illegal employer speech not invalid standing alone, if the employer was guilty of unfair labor practices without regard to whether or not there was any relationship between the speech and the violative conduct. Speech was condemned even though it bore no relationship to, and was severable from the unfair labor practices found to have been committed.<sup>91</sup>

In viewing the surrounding circumstances of employer's speech, the Labor Board has failed to consider that an employer was entitled to defend himself before his employees against vituperative and defamatory attacks upon the character and reputation of the management engaged in by a union seeking to organize the employees. In one case, some of the defamatory remarks addressed by the union to the employees described the employer's principal executive as "a person devoid of all principles," "surrounding himself with the 'little Hitlers of America'," "labor's greatest enemy" and "Fascist minded individual." The union's literature issued to the employees charged that the employer "has been despoiling the children of the northeast district for years," and said that the employer was "unpatriotic and un-American" and "had always used misguided employees for its foul purposes." The Board found illegal a speech made by an executive of the employer to the employees in an attempt to answer such accusations, although that speech repeatedly pointed out to the employees that the employer

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<sup>89</sup> These court decisions were principally *NLRB v. Virginia Electric & Power Co.*, 314 U. S. 469; *NLRB v. American Tube Bending Co.*, 134 F. (2d) 993, cert. den. 320 U. S. 768.

<sup>90</sup> *NLRB v. American Laundry Mach. Co.*, 152 F. (2d) 400; *NLRB v. Laister-Kaufman Aircraft Corp.*, 144 F. (2d) 9; *Fisher Governor Co.*, 71 NLRB 1291.

<sup>91</sup> *Monument Life Insurance Co.*, 67 NLRB 244; *Goodall Company*, 68 NLRB 252.

did not in any way desire to interfere with their right to join the union.<sup>92</sup>

Shortly before the amendment of the Act, the Labor Board again relegated the First Amendment to secondary importance by establishing the "captive audience" doctrine. Non-coercive speech of an employer was held illegal because it was addressed to the employees assembled in the plant on the employer's time.<sup>93</sup> The Board has held since that this doctrine was overruled by Section 8(c) of the present Act.<sup>94</sup>

We agree that when coercion appears, the limits of free speech are exceeded. The paramount importance of the issue requires that the line should be drawn by Congress for the guidance of the administrators of the Act. Comforts that unions may have obtained from the Labor Board's prior unwarranted restrictions of the free speech privilege of employers are illusory because of the greater threat to their constitutional rights which they, too, must enjoy.

## POINT VI.

### **The ranks of management should not be divided by compelling bargaining with supervisory employees.**

The existing Act does not compel management to bargain collectively with its supervisory employees. Unions seek to return to the interpretation of the Wagner Act which imposed such a requirement.

The record shows that compulsory recognition of unions of supervisory personnel for the purposes of collective bargaining undermines management's ability to bargain collectively and casts doubt upon the fairness of the bargaining procedure, in which rank and file employees and management have the greatest stake.

Supervisors are the "arms and legs" of management. They are management at the point of contact with the employees. In addition to responsibility for production and safety in their departments, they effectuate management's labor policies and are in position to observe and report

<sup>92</sup> *Montgomery Ward & Co.*, 64 NLRB 432, enforcement denied 157 F. (2d) 486.

<sup>93</sup> *Clark Bros.*, 70 NLRB 802, enforced 163 F. (2d) 373. The doctrine was rejected in *NLRB v. Montgomery Ward Co.*, 157 F. (2d) 486.

<sup>94</sup> *Babcock & Wilcox Co.*, 77 NLRB No. 96.

their effect and the need for change or improvement. They handle grievances in the first instance and can locate the causes for complaints as well as suggest the remedies. To the rank and file employees they are management and their conduct can establish employee opinion of management. Even under the Wagner Act, management was held liable for conduct of supervisors which the employees might reasonably believe represented the attitude of management, even though such conduct was contrary to instructions.<sup>95</sup>

Supervisory employees directly influence management's position at the bargaining table on many phases of the proposed contract. They must be consulted by management in order to adequately prepare for negotiations, and their advice plays a necessary part in the formulation of management requirements in the contract and its attitude with respect to union demands.

All of these functions of supervisory employees continue although they may be limited or directed by the provisions of the collective agreement. The supervisors' essential function in the line of management remains intact even though their authority is limited to making effective recommendations or is broad enough to include power to hire and fire. Undivided loyalty to management is an essential ingredient of the supervisory job and upon it rests the entire structure of the management's ability to operate and manage the business. Subjecting the base to conflicting interests threatens the whole structure.

Such a result was achieved under the Wagner Act. The Labor Board ruled that general foremen, foremen and assistant foremen, with supervisory authority in mass production industries, were entitled to compel collective bargaining with them on the part of the employer.<sup>96</sup> The Board conceded that by its ruling foremen were made subject to interests which would conflict with the requirements of the job, when it pointed out that,<sup>97</sup>

“In an absolute sense, of course, the Association (Foreman's Association of America) is not independent of the CIO, or any labor organization. Both are labor organizations and both are organized for basically similar purposes—the improvement of the

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<sup>95</sup> *Sperry Gyroscope Co. v. NLRB*, 129 F. (2d) 922.

<sup>96</sup> *Packard Motor Car Co.*, 61 NLRB 4; 64 NLRB 1212, enforced 157 F. (2d) 80, affirmed 330 U. S. 485.

<sup>97</sup> *Packard Motor Car Co.*, 61 NLRB 1, 16.

wages, hours, and working conditions of their membership through collective bargaining. Both have common problems and therefore a common 'bond of sympathy'. For these reasons it is to be expected that they will express moral sympathy for the organizational efforts of one another *and will, on occasion, even refuse to cross the picket line established by the other during a strike.*" (Emphasis added.)

Such a conflict of interest in itself is sufficient to justify removing management's representatives from the possibility of breach of duty, by excluding them from the field of collective bargaining. It has been commonly recognized that strikes by foremen cannot succeed without the active aid of rank and file unions because such strikers can be readily replaced by promotions from the ranks. Supervisory unions cannot succeed, therefore, without agreements for mutual assistance and support with unions representing rank and file employees.

These realities of normal industrial operations were disregarded by the Labor Board and it sanctioned the organization of supervisory employees by a union affiliated with a rank and file union. It authorized the union which represented the rank and file employees of an employer to organize their supervisors through an affiliate<sup>97a</sup> and held that the employer's refusal to bargain collectively with that union, acting on behalf of its supervisory employees, was an unfair labor practice.<sup>98</sup>

Thereby, the field was opened for rank and file unions operating through affiliates to obtain the allegiance of management's representatives. Whether or not the opportunity was used, it presented a real threat to management's ability to manage its operations and to function efficiently. It threatened the entire collective bargaining procedure by permitting the undercutting of management in negotiations.

Placing the managerial representatives in a position where they are fellow union members of rank and file employees under their supervision subjects them to the same rules of union conduct and allegiance, and creates a direct conflict with the primary duty of the supervisory employees to management.

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<sup>97a</sup> *Jones & Laughlin Steel Corp.*, 66 NLRB 386.

<sup>98</sup> *Jones & Laughlin Steel Corp.*, 71 NLRB 1261.

The labor relations field warrants no different standards of conduct for the representatives of management and of labor than other fields of endeavor, in so far as their allegiance is concerned. The rule that an agent, without the consent of his principal, should not be placed in a position to do less than the best for his principal is applicable. Management is entitled to the undivided allegiance of its representatives, through whom it must operate its business and deal with the employees on a day to day basis in the plant and at the bargaining table, whether there be industrial peace or strife. The self-interest of supervisory employees who attain a place in management, on the basis of complete loyalty and undivided performance of duty, must be subordinated to the paramount interest of confidence and fairness in the collective bargaining process. Impairment of management's established method of operating through representatives owing responsibility solely to it can cause irreparable damage to our industrial system.

## POINT VII.

**Management should retain the right to petition for elections. Employees should retain the right to terminate a union's authority.**

The present law authorizes an employer to file with the Board a petition for determination of bargaining representative of his employees when he has been presented with a claim for recognition as bargaining representative by a labor organization.<sup>99</sup> Thereby, the Labor Board's processes are invoked for the purpose of determining by a secret ballot whether the employees involved desire to be represented by the union asserting the claim.

No such provision was made in the Wagner Act, and the Board did not permit an employer to file a petition for an election unless he had been served with demands for recognition by two or more unions claiming to represent the same employees.

The Labor Board has held that an employer has the right in good faith to question the union's claim of majority status and to insist that it be resolved by a Board-conducted

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<sup>99</sup> Amended Act, Section 9(e) (1) (B).

election. In the *Artcraft Hosiery Company* case,<sup>100</sup> the Board said,

“We have held, and still hold, that an employer may in good faith insist on a Board election as proof of the union’s majority but that an employer unlawfully refuses to bargain if its insistence on such an election is motivated, not by any bona fide doubt as to the union’s majority, but rather by a rejection of the collective bargaining principle or by a desire to gain time within which to undermine the union.”

A necessary corollary to that right of the employer to insist upon an election is the right of the employer to invoke the processes whereby the election will be conducted. Insistence upon an election merely raises the issue of the union’s majority status. The filing of the petition paves the way for peaceable resolution of the question.

Union representatives claim that an unscrupulous employer with the right to file a petition therefor, can compel an election before the union is ready for it and thereby forestall successful organization of his employees. The claim overlooks the provision of the statute which bars that right to petition until the employer has been served by a union with a demand for bargaining rights. By withholding its demand for recognition until it is ready for an election, the union avoids the danger of a premature election. The possibility that an unscrupulous employer may instigate a group of employees to demand recognition so that he can file a petition, can be minimized by the Board’s application of its administrative rule requiring a union seeking recognition before it to show prima facie that it represents 30% of the employees.<sup>101</sup>

The right of the employer to petition for an election is seen, therefore, to serve a useful purpose, to do no harm to any party. It should be retained.

The present Act permits employees to revoke the authority of a bargaining representative that has been certified by the Board or is being currently recognized by their employer.<sup>102</sup> The filing of a petition for such revocation authorizes the Board to conduct an election for the purpose of

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<sup>100</sup> 78 NLRB No. 43, 22 LRRM 1212.

<sup>101</sup> NLRB Rules & Regulations, Series 5, Sec. 202.17.

<sup>102</sup> Amended Act, Section 9(c) (1) (A) (ii).

determining whether the union still represents a majority of the employees and has the right to continue to act as bargaining representative.

Under the Wagner Act, employees had no right to obtain an election for the purpose of terminating the authority of their bargaining representative. The Labor Board interpreted the law so as to preclude the filing of such petitions. On dismissing a petition for investigation and certification of representatives filed by a group of employees who alleged therein:

“The undersigned hereby alleges that a question has arisen concerning the representation of employees in the above bargaining unit, in that: Majority of employees contend that C. I. O. no longer represents them and is not their bargaining agent,”

the Board said <sup>103</sup>

“It has been our general practice, based upon consideration of policy, not to require the only union involved to participate in an election against its desires. Therefore, as a general rule, we do not entertain petitions for investigation and certification of representatives except in cases where it appears that the alleged question of representation is related directly to the right or claim of the petitioner to be recognized as a collective bargaining representative. Here there is no such claim, since by their own admission it is Petitioners’ present purpose not to act as bargaining representative.”

Thus, the employees in the bargaining unit were barred from an election for the purpose of testing the right of the recognized union to continue to represent them as bargaining representative. Nor could the employees obtain peaceable resolution of the question they raised in any other way, if the recognized union had been certified by the Board on the basis of an election. The Labor Board ruled that, having expressed their desires by secret ballot in an election conducted by the Board, no other method

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<sup>103</sup> Tabardrey Manufacturing Co., 51 NLRB 246, 248, 249.

could be regarded as of sufficient value to show repudiation of their selection. The Board stated<sup>104</sup>

“Such elections, held under the auspices of the Board, in accordance with express statutory provisions, have been uniformly found to furnish the best evidence of employees’ desires concerning representation for collective bargaining. When employees have expressed their considered opinions by a method which leaves no room for doubt as to their true desires, repudiation of their selection can be established only through the medium of an equally probative technique.”

The effect of these principles was to deny to the employees the freedom of choice of bargaining representative guaranteed by the Act. The employees were saddled with a bargaining representative they did not desire unless they secured another union to act for them, in which event the new union could file a petition with the Board and obtain an election. If they did not make such selection, the union discredited as bargaining representative could permit an existing contract to be automatically renewed pursuant to its terms or compel the employer to negotiate a new agreement. The renewed agreement or a new agreement barred the employees from designating a new union as bargaining agent for the duration of the term of any such contract.<sup>105</sup>

The decertification procedure in no measure undermines the stability of a Board certification or a contract entered into by the certified union. The present statute permits only one election during the twelve month period succeeding the last valid election.<sup>106</sup> A contract entered into by the certified representative bars any election during a reasonable term (now regarded as two years). The decertification procedure tends to reduce raiding and jurisdictional disputes. It gives full recognition to the freedom of choice of bargaining representative by the employees. It should, therefore, be retained.

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<sup>104</sup> *The Century Oxford Manufacturing Co.*, 47 NLRB 835, 845, enforced 140 F. (2d) 541.

<sup>105</sup> Eleventh Annual Report of NLRB, p. 13.

<sup>106</sup> Amended Act, Section 9(c) (3).

## POINT VIII.

**Unions, as well as management, should be liable for breach of contract.**

Under the present law, a union may be sued as an entity for violations of the labor contract.<sup>107</sup> Provision is made to protect the union members against liability for money damages assessed by a court against a union for its breach of the contract.

These provisions impose upon unions the same responsibility as upon management for breach of a labor contract.

Consideration of the Wagner Act and the present Act clearly establishes that the bargaining duty imposed thereunder was for the purpose of achieving a collective bargaining agreement binding on both parties. In *Consolidated Edison Co. of New York v. NLRB*<sup>108</sup> the Supreme Court said,

“The Act contemplates the making of contracts with labor organizations. That is the manifest objective in providing for collective bargaining.”

The signing of the labor contract is the final step in the collective bargaining process. The importance of the agreement is beyond question. In *Timken Roller Bearing Co. v. NLRB*<sup>109</sup> the Court said,

“Indeed, so important is an agreement to the bargaining process that when it is reached the Act requires a permanent memorial of its terms to avoid frustrating the bargaining process. An authentic record of its terms must be provided which could be exhibited to employees as evidence of the good faith of the employer, and so avoid fruitful sources of dissatisfaction and disagreement”.

An agreement of such importance, status and effect should be observed and effectively bind both parties. The remedies available for non-performance by the parties should be open to both of them to the same extent, if, in their judgment, they desire such remedy. Nor should any such

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<sup>107</sup> Labor Management Relations, Act, 1947, Section 301.

<sup>108</sup> 305 U. S. 197, 236.

<sup>109</sup> 161 Fed. (2d), 949, 953.

remedy be made illusory by resort to technicalities based on the theory that unions cannot be sued at common law. In *Timken Roller Bearing Co. v. NLRB*,<sup>110</sup> the Court said,

“This repeated asseration of the importance of a written and signed agreement as the culminating step in the bargaining process so as to avoid industrial strife, does not contemplate and can by no process of reasoning be conceived as a unilateral undertaking by the employer binding upon him but devoid of controls on the bargaining agent or those for whom it speaks. Certainly, it is not without its disciplines over both of the parties to it, within the reasonable scope of its terms and conditions.”

The laws of many states made it difficult to sue effectively or recover a judgment against a labor union because most of the labor unions were unincorporated associations and for that reason were not subject to suit at common law. Such technicalities shielded unions from responsibility for breach of the labor contract. The present law discards these wornout concepts and establishes unions as legal entities with full duty to perform agreements. The Labor Board pointed out:<sup>111</sup>

“The common law concept of an unincorporated labor organization as a group of individuals having no separate entity apart from its members has been discarded—to the extent that it was not already outmoded in modern jurisprudence—by the Labor Management Relations Act, 1947. It is clear that the act treats labor organizations for all practical purposes as judicial entities.”

According to the Labor Board, the breach of a labor agreement by a union does not constitute an unfair labor practice on the part of the union under the present Act. The Board said.<sup>112</sup>

“From this we also conclude that Congress did not intend to make a strike in breach of a contract an unfair labor practice *per se*.”

<sup>110</sup> 161 F. (2d) 949, 953.

<sup>111</sup> *Sunset Line & Twine Co.*, 79 NLRB No. 207, footnote 40.

<sup>112</sup> *Perry Norvelle Co.*, 80 NLRB —, 23 LRRM 1061.

The Board has recognized that breach of the labor agreement by unions occurs and must be deterred. For the purpose of fostering reliance upon the contract rather than resort to non-compliance therewith, the Board has visited responsibility upon employees who engage in a strike in violation of the no-strike clause of a contract,<sup>113</sup> and has sanctioned such discharges even where the strike was caused by the employer's unfair labor practices.<sup>114</sup> The present statute, by providing that the union may be held liable for breach of the labor contract, permits responsibility to be placed where it should rest if it caused the violation of the contract.

The provision poses no threat to union existence. It is common knowledge that many of the unions have avoided this responsibility in damages before law courts by so negotiating various forms of protective clauses, such as the "able and willing to work" provision of the United Mine Workers, as to gain complete immunity from lawsuit provisions, limitation of liability in damages, and provisions subjecting liability for breach of contract to arbitration. If the grievance and arbitration provisions of the contract are broad enough to cover any controversy and dispute, no special provision against lawsuits would seem necessary, according to a recent court decision.<sup>115</sup>

## POINT IX.

### **The President should have power to invoke restraints on strikes involving national welfare.**

The President's labor Bill erases the clear authority of Government provided in Section 208 of the Labor Management Relations Act, 1947, to secure a national emergency injunction in nationwide strike situations which endanger the national welfare. The Attorney General of the United States is of the opinion that such authority is inherent in the President without statutory guaranty.

His viewpoint has evoked strong criticism from reliable constitutional experts including some representing labor unions. It is contended that nothing in the Federal Consti-

<sup>113</sup> *Scullin Steel Co.*, 65 NLRB 1294; *Joseph Dyson & Son, Inc.*, 72 NLRB 445.

<sup>114</sup> *National Electric Products Co.*, 80 NLRB —, 23 LRRM 1148.

<sup>115</sup> *Matter of Mencher*, N. Y. App. Div., 1st Dept., Dec. 20, 1948.

tution can logically be so broadly read as to grant such implicit power to the President. The well-established concept that the Federal Government is one of limited powers, fixed in the constitution and statutes, is also relied on.

One point is clear. Any attempt by the President to exercise an alleged inherent authority to secure an injunction in a national emergency created by a labor dispute would result in a vigorously contested legal battle with the legal record overwhelmingly weighted against the existence or use of any such implied power.

The opinions of the Supreme Court Justices in the celebrated Lewis case<sup>116</sup> indicate that the Norris-LaGuardia Anti-Injunction Act would apply to any attempted exercise of the claimed inherent power of Government to an injunction in labor disputes except if there existed an employer-employee relationship between the Government and the strikers within the meaning of that decision.<sup>117</sup> The opinion of the Court states, with respect to the applicability of the Norris-LaGuardia Act to the Government's application for an injunction<sup>118</sup>:

"If we were to stop here there would be little difficulty in accepting the decision of the District Court upon the scope of the Act. And the cases in this Court express consistent views concerning the types of situations to which the Act applies. *They have gone no further than to follow the Congressional desires by regarding as beyond the jurisdiction of the District Courts the issuance of injunctions sought by the United States and directed to persons who are not employees of the United States.* None of these cases dealt with the employer-employee relationship now before us." (Emphasis added.)

Mr. Justice Black and Mr. Justice Douglas, concurring in part and dissenting in part, said<sup>119</sup>:

"For anything less than full and complete Government operation for its own account would make

<sup>116</sup> *United States v. United Mine Workers of America*, 330 U. S. 258.

<sup>117</sup> The majority opinion of the Court does not seem to disagree with the view of Mr. Justice Frankfurter that the "compelling public emergency" theory of such cases as *United States v. Debs*, 64 F. 724; 158 U. S. 564; *United States v. Hayes*, unreported, D. Ind. 1919; *United States v. Railway Employees Dept. A. F. L.*, 283, F. 479, 286 F. 228, 290 F. 978, was limited by the Norris-La Guardia Act.

<sup>118</sup> 330 U. S. 258, 280.

<sup>119</sup> 330 U. S. 258, 329.

this proceeding the equivalent of the Government's seeking an injunction for the benefit of private employers. We think the Norris-LaGuardia Act prohibits that."

Mr. Justice Murphy in his dissenting opinion pointed out that<sup>120</sup>:

"The Government concededly could not obtain an injunction in a private labor dispute where there has been no seizure of private properties, *no matter how great the public interest in the dispute might be.*" (Emphasis added).

Thus, if there exists any inherent emergency Government authority to secure an injunction in a nation-wide labor dispute it is conditioned upon (1) the existence of the power to seize the property involved, and (2) the "full and complete" exercise of that power so as to create an employer-employee relationship between the Government and the strikers.<sup>121</sup> If the Government's right of seizure of the property does not exist<sup>122</sup> or has not been sufficiently exercised, the Government must meet the requirements of the Norris-LaGuardia Act in order to obtain an injunction.

Under such circumstances, it is at least doubtful that the Government could satisfy the requirements of that Act. One of the findings required to be made under that Act as a condition precedent to the issuance of an injunction is that "the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection".<sup>123</sup> Manifestly, the Government as claimant could not support a finding that its property was involved in the dispute in the absence of Government seizure thereof. Nor could the government confess to an inability or unwillingness to protect the private property involved in a national emergency. Furthermore, the danger to property could not be alleged until it was threatened by the strikers with the result that a peaceable strike would eliminate any possibility of a Government injunction despite the threat to the national welfare.

<sup>120</sup> 330 U. S. 258, 338.

<sup>121</sup> *United States v. United Mine Workers of America*, 330 U. S. 258.

<sup>122</sup> The government's authority to seize plants, mines and facilities under the War Labor Disputes Act has expired. (50 U. S. C. A. App. Sect. 1510, note).

<sup>123</sup> 29 U. S. C. A. Sec. 107.

In view of these obstacles to the use of an emergency Government injunction in the national interest, common sense, logic and past experience would seem to dictate that such power and the exercise thereof be clearly defined, safeguarded and limited by the statute. The history of nationwide strikes of the past few years shows that the national welfare requires that there be no impairment of the power to secure an injunction for use in labor disputes under the appropriate emergency circumstances.

## P O I N T   X .

### **Welfare funds should be trust funds, jointly administered by management and union representatives.**

The present law regulates payments by employers to unions for insurance, pensions and other specified benefits for employees and their families. These measures establish two principal requirements, namely, that these payments constitute trust funds to be used solely and exclusively for the benefit of the employees, and that there shall be joint administration of such funds by union and employer representatives, with a neutral person designated by them to resolve any deadlock.

These provisions of the law have been criticized by unions as injecting employers into an area in which they have no rightful interest, and as hamstringing the use of welfare funds.

These contentions are belied by the facts.

Many companies voluntarily established pension funds and administered them in the employees' interest. Management for a long time believed that to do so was exclusively its function. The widening of the area of mandatory collective bargaining to include employee insurance and pension funds<sup>124</sup> has not diminished management's interest in the welfare of its employees and in the proper disposition of funds earmarked for their benefit.

Insurance and welfare funds accumulate rapidly. In many industries, payments are made to a single fund on a multi-employer basis. Since these funds represent large accumulations of money held by unions for the benefit of

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<sup>124</sup> *Inland Steel Co.*, 77 NLRB 1; *W. W. Cross & Co.*, 77 NLRB 13 No. 188.

employees, government supervision in the public interest is not only justified but essential. Insurance companies are under governmental supervision and regulation.

Arbitrary control and right of dispensation of such large funds by unions create real possibilities of abuse. Such unregulated power over huge funds can be utilized by union representatives as a means of control over employees. It may also be utilized to stifle the democratic process within labor organizations. It tempts the dishonest and opens the way for racketeering practices.

It cannot be denied that welfare funds for the benefit of employees should be, and constitute, trust funds. To achieve the benefits for which welfare funds have been established, their use must be limited to the objectives for which they have been created.

The wisdom of a joint administration is apparent from the nature of the trust. Excepting the form of administration of the funds from the area of collective bargaining by providing for joint supervision establishes a fair balance in the interest of the contracting parties and the employees.

Joint administration is not novel. In fact many funds were already thus being administered before the existing provisions were added to the law. A study by the Bureau of Labor Statistics<sup>125</sup> states:

“A little more than a third of the employees covered by health benefit programs included in this report are under plans which are jointly administered by the union and the employer. Another third are covered by programs for which insurance companies assume the major administrative responsibility; and somewhat less than a third are under those administered by a union.”

The administration of the funds, except to the extent fixed by statute and contract, remains a subject for collective bargaining between management and union representatives.

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<sup>125</sup> Health-Benefit Plans Established Through Collective Bargaining, 1945 Bull. 841, p. 2.

## POINT XI.

### **Benefits of the Act should be denied to Communist-dominated unions.**

The present law deprives unions of recourse to benefits of the Act unless their officers and the officers of their international unions file affidavits of non-Communist affiliation and belief.<sup>126</sup>

There cannot be much dispute that the national interest requires the elimination of dominating Communist influence in labor unions. Many of the labor leaders who have criticized the affidavit requirement have fought the influence of Communists in their organizations for many years.

The constitutionality of the non-Communist affidavit requirement has already been sustained by several of the courts.<sup>127</sup>

Actually, the affidavit has been but a short step toward eliminating the influence of Communists in labor organizations. The Labor Board has held the sworn statement upon its form of affidavit is conclusive on the question of compliance with the regulation. The Board has refused to accept evidence at hearings that union officers are Communists despite the affidavit.<sup>128</sup>

The pride of certain union officials, who have regarded the present regulation as an affront to union dignity, should give way to the compelling public purpose which the enactment achieves in a small measure. If the price to be paid for retaining the regulation is to balance the books by applying the same regulation to employers who would seek recourse to the Act, that requirement should be enacted.

The force of government should not be available to labor organizations that are dominated or controlled by Communists. If anything, the regulations should be made more effective, so that evasion cannot be achieved by merely changing the structure of the officialdom of these unions that are subject to substantial Communist influence.

<sup>126</sup> Amended Act, Section 9(h).

<sup>127</sup> *American Communications Association v. Douds*, 79 F. Supp. 563 Cert. granted Nov. 8, 1948; *National Maritime Union v. Herzog*, U. S. D. C. D. C., April 13, 1948, cert. den. 22 LRRM 2215.

<sup>128</sup> *Craddock-Terry Shoe Co.*, 76 NLRB 842; *United States Gypsum Co.*, 80 NLRB No. 122.

### **Conclusion.**

The provisions of the present law, discussed above, impart to unions a need for responsibility which some have in the past ignored or denied. In the interest of achieving a sound labor policy based on the fostering and encouraging of mutual understanding and regard, and of promoting genuine collective bargaining by both parties, one must consider these provisions as mandatory in any legislation so essential to the welfare of our economy as our basic labor law.







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## A brief in support of certain provisions



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